

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

CITY CENTRE DEVELOPMENT
COMPANY OF BUFFALO, L.P.

Case No. 94-13315 K

Debtor

CITY CENTRE DEVELOPMENT
COMPANY OF BUFFALO, L.P.

Plaintiff

-vs-

AP 95-1284 K

H&M PLUMBING & MECHANICAL
CONTRACTING, INC. and
CLAYTON B. OBERSHEIMER, INC.

Defendant

ORDER VACATING DEFAULT AND JUDGMENT BY DEFAULT,
AND DIRECTING RE-ARGUMENT

The current briefs' focus on the vacating of defaults and default judgments is misplaced.

Entry of default and of default judgment in this Adversary Proceeding were clear error in this case because such entries occurred four days after the Defendant sought leave to file a late Answer.¹

Entry of default must be vacated under Rule 55(c) (and Bankruptcy Rule 7055) and the judgment must be vacated under Rule 60(a) (and Bankruptcy Rule 9024).

¹Although styled as a Motion to Vacate Judgment by Default, judgment had merely been requested, not granted, as of the February 22, 1996 filing of the Motion. Thus, the Motion will be deemed to be a request to extend the time to Answer, under Bankruptcy Rule 9006(b) (1).

The question now is whether the Defendant's request to extend the time to Answer should have been granted as of February 22, 1996, under Bankruptcy Rule 9006(b)(1). That question is governed by the teachings of *Pioneer Investment Services Co. v. Brunswick Assoc. L.P.*, 507 U.S. [123 L.Ed.2d 74, 113 S.Ct. 1489] (1993), a case which I find little-mentioned in the current briefs.

Moreover, although I see no clear evidence in *Pioneer* that the issue of "meritorious defense" has any bearing on a finding of "excusable neglect" under Bankruptcy Rule 9006(b), the current briefs are largely devoted to that issue.

This matter shall be re-argued in light of the above on Monday, April 15, 1996, at 2:00 p.m.

The Default and Judgment by Default are hereby vacated.

SO ORDERED.

Dated: Buffalo, New York
March 26, 1996

/s/Michael J. Kaplan

U.S.B.J.